No. 97-1909

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MURPHY BROTHERS, INC.,
Petitioner,

v.

MICHETTI PIPE STRINGING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the thirty-day removal period provided by 28 U.S.C. § 1446(b) begins to run prior to service of process when a named defendant receives a copy of the complaint by any means and from any source.

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INTEREST OF *AMICUS CURIAE* [1]

The Product Liability Advisory Council, Inc. ("PLAC"), is a non-profit corporation with 123 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers in a wide range of industries, from automobiles to elec-

[1] In accordance with Supreme Court Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no persons or entities, other than the *amicus*, have made a monetary contribution to the preparation or submission of this brief. Letters from counsel for Petitioner and Respondent have been filed with the Court Clerk indicating the parties' consent to the filing of an *amicus* brief in this case by the Product Liability Advisory Council, Inc.

tronics to pharmaceutical products. A list of PLAC's current corporate membership is provided in the attached Appendix. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (*i.e.*, non-voting) members of PLAC.

PLAC's primary purpose is to file *amicus curiae* briefs in cases with issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus curiae* briefs in both state and federal courts, including this Court.

The effective exercise of the right to remove a case from state to federal court and its impact on federal practice and procedures are of vital concern to American industry. Although it is not an issue that is strictly limited to the area of product liability, it is quite common in those cases. As a significant voice on issues in this area, PLAC submits this *amicus curiae* brief in order to identify for the Court the broader concerns and practical implications involved in making a determination on the issue before it.

SUMMARY OF ARGUMENT

The right of access to the federal courts is embedded in the Constitution. It both provides litigants access to an impartial federal forum and ensures that federal law will be interpreted in a uniform manner. The first Congress created a mechanism for defendants to assert this right by providing for the removal of a civil case from state to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The Court has long protected the right of removal and has cautioned that the Federal courts may, and should, " 'take such actions as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals.' " *Wecker v. National Enameling and Stamping Co.*, 204 U.S. 176, 182-83 (1907), *quoting Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906).

This right is diminished where procedural requirements encourage abuse of the removal rules by plaintiffs and unnecessarily create practical problems for corporate defendants that preclude adequate notice of when the removal period begins. The receipt rule adopted by the Court of Appeals in this case not only clashes with the ideals of federal jurisdiction, but also raises serious constitutional questions and promotes wasteful litigation over purely procedural nuances.

Amicus submits that the federal removal statute should be read as originally intended so as to ensure that reasonable access to federal fora is available to those defendants who are involved in commercially complex arrangements governed by federal law or in disputes among interstate parties.

ARGUMENT

I. THE REMOVAL STATUTE WAS INTENDED TO IMPLEMENT CONSTITUTIONALLY PROTECTED RIGHTS IN A UNIFORM AND EQUITABLE MANNER.

The right to trial in a federal court is rooted in the Constitution and was viewed by the Founding Fathers as a fundamental feature of the new federalism.[2] In the case of a suit between citizens of different states, diversity jurisdiction assured the defendant of a venue less likely to be subject to provincial pressures and local biases. Diversity fostered the perception of fairness; "federal question" jurisdiction promoted national uniformity and placed the responsibility for resolving inherently federal questions in the hands of those best suited for resolving such questions, namely federal judges.

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[2] *See* THE FEDERALIST, Nos. 80 and 81 (New American Library ed. 1961) (Hamilton); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 2, 12-15 (1948).

Paradoxically, while both diversity and federal question jurisdictions were interposed to guard against the potential shortcomings of state courts, through the middle of this century access to federal courts was largely a function of state law. The federal removal statute was keyed to state procedures and expressly incorporated local, not national, standards. Moreover, the removal petition itself was filed in state, not federal court. Specifically, under the Judicial Act of 1911, ch. 231, 36 Stat. 1087, 1095, a defendant was required to file a removal petition in state court on or before the date it was required to file its first responsive pleading. See 28 U.S.C. § 72 (1940). In some states, defendants had 10 days in which to file their removal petitions while in other states defendants could wait up to 45 days or more.[3] In short, significant federal rights that should have been uniform were governed by varying state law and assessed, at least initially, by state judges.

To bring uniformity and fairness to what was an otherwise chaotic system of removal, in 1948 Congress enacted a removal statute—the predecessor of the one at issue here. Congress had concluded that the process for gaining access to federal courts should not hinge on where a plaintiff chose to institute suit any more than it should depend on the vicissitudes of state procedure. Congress recognized that since federal court jurisdiction springs from the Constitution and fosters important national goals, removal

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[3] *See Coco v. Altheimer*, 46 F. Supp. 321, 322 (W.D. La. 1942) (defendant has ten days from service to respond if served in or within ten miles of the location where the court is held; up to fifteen days for defendants served more than ten miles from court's location); *Fail vs. American Fid. & Cas. Co. of Richmond, Va.*, 74 F. Supp. 904, 905 (E.D. S.C. 1947) (defendant must answer within twenty days of service); *Wofford v. Hopkins*, 45 F. Supp. 257, 258 (W.D. Tex. 1942) (defendant must respond within twenty days of service); *Kaull v. Johnson*, 218 N.W. 606, 607 (N.D. 1928) (defendant served within state has thirty days to respond; defendant served out of state has 45 days to respond).

should be a matter within the exclusive domain of the federal government.

The 1948 amendments to the Judicial Code addressed these prudential concerns by permitting removal if the defendant filed a petition in federal court within twenty days "after commencement of the action or service of process, whichever is later." In short, under the original statute of 1948, the period for removal would not begin before a defendant received service of process.

Unfortunately, the statute failed to fully achieve both uniformity and equality. The law's language proved to be too inflexible to accommodate the significant variation in state procedures. For example, in New York a plaintiff was not required to file or serve a copy of the complaint: *In personam* jurisdiction attached when the defendant received a copy of the summons alone even though the complaint may never have been filed. Thus, with respect to suits filed in New York state courts, a defendant's right to remove could evaporate before it received a copy of the complaint and before it could determine whether removal was even warranted. To protect the federal rights of those who were subject to procedures such as existed in New York, Congress in 1949 amended the removal statute by providing that a removal petition could be filed within twenty days (now thirty) of the "receipt by the defendant, through service or otherwise, of the initial pleading . . . ." H.R. REP. No. 81-252 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1254, 1268. In context, the amendment operated to expand the removal rights of those defendants already subject to a court's jurisdiction.

Ironically, what began as a simple amendment to ensure that defendants in New York state courts were not inadvertently deprived of their right to federal court jurisdiction has devolved, through erroneous appellate court interpretation, into a process under which defendants in all states can inadvertently lose their access to federal

court. What has emerged are two competing schools of thought: (1) the service rule and (2) the receipt rule. The service rule gives effect to the legislative goals of uniformity and fairness by providing that both service of process *and* receipt of the initial pleading are required to trigger the removal period. *See, e.g., Love v. State Farm Mut. Auto Ins. Co.*, 542 F. Supp. 65 (N.D. Ga. 1982). The receipt rule triggers the removal period simply upon receipt of the initial pleading by any means and from any source whatsoever. *See, e.g., Michetti Pipe Stringing, Inc. v. Murphy Bros., Inc.*, 125 F.3d 1396 (11th Cir. 1997); *Tyler v. Prudential Life Ins. Co. of America*, 524 F. Supp. 1211 (W.D. Pa. 1981). By dispensing with the requirement for service of process, the receipt rule creates notice problems, permits rights to be lost before any court's jurisdiction is created, and undermines reasonable corporate practices that ensure responsible decisionmakers receive notice of a lawsuit within a sufficient time to exercise their removal rights.

This Court has been asked to resolve the split among lower federal courts and select the appropriate point at which the removal period begins under 28 U.S.C. § 1446 (b). *Amicus* submits, for the following reasons, that the appropriate trigger is service.

II. THE RECEIPT RULE, WHICH DISREGARDS THE REALITIES OF EXPANSIVE INTERSTATE COMMERCE, CREATES PRACTICAL PROBLEMS AND FOSTERS UNNECESSARY COLLATERAL LITIGATION.

The rules governing the application of the receipt rule are uncertain. These uncertainties prevent corporate defendants from knowing when to act to preserve their rights. Moreover, the receipt rule creates practical problems for corporate defendants (which vary depending on how the rule is applied) and increase the risk that employees responsible for removal decisions will not receive

timely notice that the removal period has started to run. They also promote gamesmanship by plaintiffs' counsel to lure unwary defendants into waiving their removal rights. These practical problems, coupled with the dearth of case law regarding the application of the receipt rule, will lead to numerous collateral disputes that will drain court resources and waste time.

A. The Receipt Rule Creates Practical Problems for Corporate Defendants.

Under the service rule, a known and finite number of corporate employees are eligible to receive service at a known and finite number of locations. Procedures for handling service of process can be taught to those employees. Indeed, the formality of service itself is an important alarm and acts to impress upon the corporate employee the significance of the documents served, and the importance of acting upon the service according to established procedures.

No such significance attaches to a faxed copy of a complaint. Indeed, the ubiquity of fax machines and their routine use belies the significance of the content of what is sent. For a faxed copy of a complaint to be handled expeditiously, someone must know that the *content* of a faxed document is important. Yet the routine nature of facsimile messages, and the volume of faxes received at a corporate office, serve to mask the significance of the actual message. In this context, a copy of a complaint can easily become just another document to be routed in the mail cart—time for delivery unknown. *See Barr v. Zurich Ins. Co.*, 985 F. Supp. 701, 704 (S.D. Tex. 1997) (complaint "received" when signed for by mailroom clerk at agent's office, although complaint was subsequently misfiled at defendant's headquarters); *Spreeman v. Health-South Corp.*, 1996 WL 129814, at *2 (D. Kan. Feb. 27, 1996) (addressee of fax claimed never to have received fax); *Roe v. O'Donohue*, 38 F.3d 298, 303-04 (7th Cir. 1994) (receipt by receptionist triggered removal period

although complaint not forwarded to responsible decision-maker for several days).

Advances in technology and telecommunications will only exacerbate the notice problems inherent in the receipt rule. In jurisdictions where receipt by computer is deemed valid, a complaint sent by electronic mail ("e-mail") to the corporation's general e-mail address could be overlooked in the crush of messages. Internet gateways, which frequently destroy the format of documents, may render the complaint unrecognizable as a legal document. A faxed complaint sent to a corporation's legal department after hours the day before a holiday weekend will likely languish unread for several days. In the meantime, the removal period will start to run, reducing the defendant's time to determine whether the case can and should be removed, to hire local counsel, and to make other arrangements it deems necessary.

Under the receipt rule, corporate defendants will be uncertain as to whether the particular papers they received have triggered the removal period. For example, it is unclear whether receipt of a complaint with missing pages triggers the removal period. Are defendants who receive partial complaints under a duty to affirmatively seek out the missing portions? If so, does the removal period start upon receipt of the partial complaint or upon receipt of the missing pages? This interpretation of the rule is particularly vulnerable to abuse by plaintiffs' counsel, who would shorten defendants' response time by delivering incomplete complaints to their adversaries. Similarly, it is unclear whether a defendant must act immediately to preserve its removal rights when it receives an unsigned, unfiled, or draft complaint. How defective can a "copy" of a complaint be and still trigger the removal period? *See North Jersey Savings & Loan Ass'n v. Fidelity & Deposit Corp. of Maryland*, 125 F.R.D. 96, 100 (D. N.J. 1988) (removal period triggered upon receipt of unfiled complaint accompanied by letter stating complaint is to

be filed); *cf. Schneehagen v. Spangle*, 975 F. Supp. 973, 973-74 (S.D. Tex. 1997) (removal period does not begin until state action is filed). *See also Reece v. Wal-Mart Stores*, 98 F3d 839, 843 (5th Cir. 1996) (period triggered upon receipt of unsigned, file-stamped complaint); *Zatarain v. WDSU-TV*, 1993 WL 98681, at *2 (E.D. La. March 26, 1993) (unpublished) (although pleading was not conformed, defendant was on notice of charges cited therein).

The common practice of providing defendants with a "courtesy copy" of a file-stamped complaint along with a settlement demand also creates practical problems. Courts have found that this triggers the removal period under the receipt rule, even if the plaintiff is attemping to resolve the matter without proceeding with service. In such a case, the defendant risks waiving its right to removal if it relies on the assurances of plaintiff's counsel that the complaint is simply for purposes of settlement discussions. The complications associated with this otherwise laudable practice, one designed to promote settlement, are not fanciful: They occurred in the case *sub judice*, as well as in others. *See Valle Trade, Inc. v. Plastic Specialties & Technologies, Inc.*, 880 F. Supp. 499, 500 (S.D. Tex. 1995) (fact that plaintiff was evaluating settlement proposals and had not been served did not preclude commencement of removal period on receipt of courtesy copy); *Boyles v. Junction City Foundry, Inc.*, 992 F. Supp. 1246, 1249 (D. Kan. 1997) (removal period triggered by receipt of complaint despite plaintiff counsel's assertion service would be withheld pending settlement discussions). *See also Harding v. Allied Prods. Corp.*, 703 F. Supp. 51, 52 (W.D. Tenn. 1989) (branch office employees who received summons and complaint erroneously assumed they were courtesy copies and that original process had been received at corporation's out-of-state headquarters).

Additional practical problems are created when a lawsuit is filed against multiple corporations. Most courts

hold that in suits naming multiple defendants, when the removal period begins to run for one defendant, it begins to run for all defendants. *See Getty Oil Co. of Texas v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262-63 (5th Cir. 1988); 16 MOORE'S FEDERAL PRACTICE ¶ 107.30[3][a][I] (3d ed.). *But see McKinney v. Board of Trustees of Maryland Comm. College*, 955 F.2d 924, 926-28 (4th Cir. 1992). Notice problems are inherent in application of the receipt rule to multiple-defendant cases; one corporate defendant's removal rights may be triggered by the receipt of a complaint by a clerical employee at another defendant's office. Moreover, the removal rights of all the defendants could turn on the actions of a defendant who is never formally part of the lawsuit. The plaintiff might provide one of several defendants with a courtesy copy of the complaint, fail to serve process on that defendant, and later serve process on the remaining defendants. The removal period would appear to begin to run for all the defendants upon the receipt of the complaint by the unserved defendant, even though the unserved defendant is not required to join in the removal or be considered in determining whether the case is removable. *See* 28 U.S.C. § 1441(b).

The receipt rule also encourages corporations to systematically practice ignorance about their legal affairs. Some companies direct outside counsel to refrain from reporting the existence of new lawsuits, out of concern that the removal period will be triggered prematurely. This discourages pre-suit resolution of disputes and cannot contribute to an efficient legal system.

Adopting the service rule resolves these problems. The service rule ensures that process will be served on a limited number of corporate agents in predetermined locations, and allows corporate defendants to ensure that corporate counsel are immediately notified of the suit. The service rule eliminates the courtesy-copy problem, promotes certainty by identifying a date-certain at which the removal period begins, and allows companies to address their legal affairs in a well-considered manner.

B. The Receipt Rule Encourages Confusion and Unnecessary Collateral Litigation Over the Terms of Its Application.

As might be expected in light of these problems, courts in different jurisdictions following the receipt rule are increasingly being asked to resolve numerous disputes about its application. Selection of the receipt rule in this case will create further unnecessary collateral litigation over whether the defendant "received" a "copy" of an "initial pleading."

The questions requiring resolution in numerous jurisdictions are varied. They include: What is "receipt"?[4] Which employees may "receive" the complaint on behalf of the corporation?[5] Does receipt of the complaint by the corporation's outside counsel or insurance carrier constitute receipt by the corporation?[6] Is receipt by facsimile

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[4] *See, e.g., Pillin's Place v. Bank One, Akron, N.A.*, 771 F. Supp. 205, 208 (N.D. Ohio 1991) (suggesting need for a case-by-case determination of whether "delivery of the initial pleading is made in a manner which, objectively viewed, is calculated to give fair notice to the defendant").

[5] *See, e.g., Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) ("receipt" exists upon delivery of complaint to agent authorized to accept service of process); *Roe*, 38 F.3d at 303-04 ("receipt" by receptionist triggers removal period); *Reece*, 98 F.3d at 843-44 ("receipt" exists upon delivery of complaint to corporate officer who was not authorized to receive service of process).

[6] *See, e.g., Perkins v. Mari Trend, Inc.*, 1996 WL 277613, at *2 (E.D. La. May 21, 1996) (not reported) (no receipt where courtesy copy was mailed to attorney who previously represented defendant but who was not authorized to accept service for this action); *Joiner v. Kayval Transportation Inc.*, 979 F. Supp. 1252, 1254-55 (W.D. Ark. 1997) (receipt by defendant's attorney sufficient to trigger removal period); *Bullard v. American Airlines, Inc.*, 929 F. Supp. 1284, 1284-85 (W.D. Mo. 1996) (receipt of courtesy copies by counsel for airline's insurer does not trigger period); *Davis v. Bauer*, 599 F. Supp. 776, 778-79 (E.D. Pa. 1984) (receipt by insurance carrier approved where carrier was authorized to accept service of process).

or e-mail valid? What constitutes receipt by facsimile or e-mail?[7] Does an unconformed copy of a complaint, a draft complaint, or an unfiled complaint constitute an initial pleading?[8]

Because of the unsettled nature of the law governing the application of the receipt rule, plaintiffs and defendants will be unable to determine whether removal is barred until a court considers their case. This lack of predictability will create unnecessary litigation and frustrate the principles of uniformity and fairness inherent in the 1949 amendment. Congress clearly intended the identification of the point at which the removal period begins to run to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty and unproductive and ever-increasing litigation. The "federal interests in uniformity, certainty, and the minimization of unnecessary litigation," which may be properly considered in construing a federal statute, support adoption of the service rule. *See Wilson v. Garcia*, 471 U.S. 261, 275 (1985) (rejecting construction of limitations statute which "inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of [42 U.S.C.] § 1983.").

There is no need to drain limited court resources by litigating these and other issues when adoption of the service rule will allow quick resolution of issues through reference to a well-developed body of state service of process

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[7] *See Bell v. Marmaras Navigation, Ltd.*, 1996 WL 328778, at *1, 3 (E.D. La. June 13, 1996) (unpublished) (addressing the difficulty of proving receipt by fax).

[8] *See Reece*, 98 F.3d at 843 (30-day period triggered upon receipt of unsigned, file-stamped complaint); *Zatarain*, 1993 WL 98681, at *2 (although pleading was not conformed, defendant was on notice of charges cited therein); *Schneehagen*, 975 F. Supp. at 973-74 (removal period not triggered until state court action is filed); *North Jersey Savings & Loan*, 125 F.R.D. at 100 (removal period triggered upon receipt of unfiled complaint accompanied by letter stating complaint is to be filed).

law. *See Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329, 340 (D. S.C. 1996).

III. NOTICE PROBLEMS INHERENT IN THE RECEIPT RULE UNDERMINE THE POLICIES SUPPORTING FEDERAL JURISDICTION.

The right to federal court jurisdiction, whether based on diversity or federal question grounds, is rooted in the Constitution. Article III, § 2, provides, in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies . . . between Citizens of different States . . . and . . . foreign States, Citizens or Subjects.

Defendants' abilities to exercise this right will be hampered or barred by the notice problems created by the receipt rule. Litigants' inability to invoke a federal forum will undermine the purposes for federal jurisdiction—ensuring the well-considered and uniform development of federal law and ensuring litigants an impartial forum.

A. Adoption of the Receipt Rule Undermines the Policy of Uniformity in Federal Law.

At the heart of federal question jurisdiction, and the accompanying right to removal on federal question grounds, is "the importance, and even necessity, of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee* 14 U.S. (1 Wheat) 304, 347-48 (1816) (Story, J.) (emphasis in original); Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470.

Contrary to congressional intent, applying the receipt rule will lead to greater disparity, not uniformity, in the interpretation and development of federal law. Fewer cases will be removed to federal court, since more defendants will inadvertently waive their removal rights due to notice

problems created by the receipt rule. Instead, state courts will increasingly be called upon to resolve often-complex questions of federal law.

State courts uniformly have less experience resolving federal law issues than do federal courts. "[F]ederal courts are comparatively more skilled at interpreting and applying federal law, and are much more likely correctly to divine Congress' intent in enacting legislation." *Merrell Dow Pharmaceutical Inc. v. Thompson*, 478 U.S. 804, 827 (1986) (Brennan, J., dissenting). This, along with the sheer number of state courts, suggests that state-court interpretation of federal law will lead to a more chaotic, less precise interpretation of federal law.

As application of the receipt rule undermines the congressional goal of uniformity in the interpretation of federal law, this Court should refuse to adopt it and enforce the service rule.

B. Adoption of the Receipt Rule Undermines Defendants' Access to an Impartial Federal Forum Through Diversity Jurisdiction.

Diversity jurisdiction, which is as old as the Republic, assures an impartial forum in circumstances where the parties' interests or identities might otherwise operate to prevent impartiality. *See, e.g., Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945) ("Diversity jurisdiction is founded on assurances to non-resident litigants of courts free from susceptibility to potential local bias."); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State.)" An impartial forum was considered to be particularly important for the resolution of commercial disputes between citizens of different states.[9]

[9] *See* Tony Allan Freyer, THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY, 19-30 (JAI Press ed. 1979) (discussing impact of development of federal jurisdiction on problems of commercial litigation in eighteenth and nineteenth centuries); Frank, *supra* n.2, at 28 (listing as motivations behind implementation of diversity jurisdiction: desire to avoid regional prejudice against commercial litigants; desire to permit commercial interests to litigate controversies; and desire to achieve more efficient administration of justice for commercial class).

An issue of paramount interest to the framers of the Constitution,[10] the assurance of an impartial forum continues to be of serious concern to defendants, particularly corporate defendants.[11] For example, a 1992 study found that diversity jurisdiction was invoked in nearly two-thirds of the cases removed from state to federal court in one

[10] Alexander Hamilton explained:

> [I]n order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

THE FEDERALIST. No. 80, *supra* n.2, at 478.

[11] Neal Miller, *An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction*, 40 AM. U. L. REV. 369, 389 (Winter 1992) (funded by the State Justice Institute). There were 18,860 private party cases removed from state to federal court in fiscal year 1987. Of these, 5,902 were federal question cases and 12,598 were diversity cases. *Id.*

The study, conducted by the Institute for Law and Justice, analyzed cases from the database created by the Administrative Office of the United States Courts of all private party cases removed to federal district court for fiscal year 1987. (The year 1987 was selected because it was the most recent year for which a computerized database was available at the time the study commenced.) *Id.* at 388-89 and n.82.

year.[12] The typical removal case, whether based on diversity or federal question jurisdiction, involved an in-state individual plaintiff and an out-of-state corporation. The most prevalent actions were contract, tort and products liability cases (72% of all private party removal actions).[13]

Attorneys perceive that out-of-state business defendants are confronted with unfavorable bias in state courts.[14] In the 1992 study, anti-defendant-related bias was reported by 77.4% of defense counsel surveyed.[15] The most common bases for bias reported by defense counsel were out-of-state status (reported by 50.7%) and business/corporation status (44.8%).[16] These reports were corroborated by plaintiffs' attorneys, over half of whom surveyed (53.4%)

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12 *See generally id.* Researchers for the Institute of Law and Justice randomly selected 600 cases from a universe of 18,860 private party removal cases filed in federal district court during FY 1987. They sent two survey mailings and followed up with telephone interviews. Survey questions focused on the presence of local bias directed against either party, the competency of the judiciary, procedural burdens, geographic convenience, and costs. *See id.* at 393-96.

13 *Id.* at 389.

14 *See id.* at 408-13. *See also* Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 99 (1980) (survey of 405 attorneys in the Chicago area found evidence of fear of local bias); *Note, The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965) (survey by law students in Virginia area found local bias a factor). *Cf. Federal Diversity of Citizenship Jurisdiction: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 260-64 (1978) (survey of 24 attorneys in two federal judicial districts in Minnesota inconclusive); Marvin R. Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962) (survey conducted on two federal judicial districts in Wisconsin did not find bias).

15 Miller, *supra* n.14, at 408-09.

16 *Id.*

said defendants faced unfavorable bias.[17] Plaintiff's counsel found out-of-state bias to be the most common (26.3%), followed by type of business (18%) and incorporated status (17.6%).[18] Reports by defense counsel of bias against out-of-state litigants were more prominent in diversity cases (56.3%) than in federal question cases (31.8%).[19]

Whether this perception is accurate is not relevant—in the area of "fairness," perceptions are more critical than reality. The perception of procedural fairness is the primary factor in litigants' attitudes toward the justice system, even more so than the actual outcome of a lawsuit. *See* E. Allan Lind & Tom R. Tyler, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, 64-76, 94-98 (Plenum Press, ed. 1988) (discussing how procedures, events, and outcomes affect judgments of procedural fairness). The removal mechanism is designed to assuage the fears of litigants and promote confidence in the equitability of the justice system:

> However true the fact may be that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled on other grounds, Louisville C. and C. R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844). *See also Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 354 (1855) (Diversity jurisdiction is to "make people think and feel . . . that their relations to each other were pro-

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17 *Id.* at 408-09.

18 *Id.* at 409. *See also id.* at 410-13.

19 *Id.* at 410.

tected by the strictest justice, administered in courts independent of all local control . . . .").

The congressional purpose for diversity jurisdiction is undermined by the receipt rule. By dispensing with service of process requirements, the rule creates notice problems that will lead defendants, particularly corporate defendants, to inadvertently waive removal rights. The service rule, on the other hand, preserves a defendant's ability to obtain an impartial forum through removal in accordance with the statute.

IV. THE RECEIPT RULE CREATES DUE PROCESS CONCERNS.

The right to an impartial decisionmaker is an "essential" constitutional right. *Goldberg v. Kelly*, 397 U.S. 254, 266-67 (1970). As this Court has recognized:

> The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jericho, 446 U.S. 238, 242 (1980); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (due process demands impartiality on part of those that function in judicial and quasi-judicial capacities). Congress granted defendants a mechanism to obtain access to federal courts through the removal process. By dispensing with the service of process requirement, the receipt rule chips away at the constitutional due process protections which allow defendants to exercise this right.

The notice problems created by the receipt rule violate due process:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded

> finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). By erecting artificial barriers to the federal courts, the receipt rule may prevent corporate defendants from receiving adequate notice that the removal period has been triggered.[20] As a result, these defendants will be permanently deprived of the opportunity to exercise their right to a federal forum without adequate notice that the right was even at risk.[21] This is improper; as Congress has chosen to create the right to an impartial federal forum and extend it to out-of-state defendants by way of the removal laws, abridging this right by adopting an interpretation of the rule that divests a defendant of this right without adequate notice is constitutionally flawed. *Goldberg*, 397 U.S. 254; *Fuentes v. Shevin*, 407 U.S. 67 (1972).

The receipt rule also causes jurisdictional problems that violate due process guarantees. A defendant cannot have its rights abridged by a court that lacks personal jurisdiction over it. This "protects an individual's liberty interest in not being subject to the binding judgment of a forum with which he has established no meaningful contacts, ties or relations." *Burger King v. Rudzewicz*, 471 U.S. 462, 471-72 (1985), *quoting International Shoe Co.*

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[20] *See* Part II, *supra*.

[21] The fact that a defendant may waive its removal right does not mean that the right does not exist. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 243 n.31 (1973) (voluntary consent to search is not "an intentional relinquishment or abandonment of a known right or privilege."); *Rust v. Sullivan*, 500 U.S. 173, 196 (1991) (statute requiring consent to waive certain speech rights to obtain federal funding does not void First Amendment free speech guarantees).

v. Washington, 326 U.S. 310, 319 (1945).[22] Service of process is a threshold requirement for a court to establish personal jurisdiction over a defendant. *Mullane*, 339 U.S. at 313. The ideals of "fair play and substantial justice" are controverted by an interpretation of § 1446(b) that allows a defendant to be permanently divested of its rights to litigate in a federal forum by a court lacking personal jurisdiction over that defendant. *See International Shoe*, 326 U.S. 310, 316 (1945). As a result of the conflicts with the due process clause, the interpretation of the statute that gives rise to the receipt rule should be rejected. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500, 507 (1979) (statute must be construed where possible to avoid constitutional conflicts).

Use of the service rule preserves the integrity of the federal courts. It ensures that service of process is completed before any of a defendant's rights are determined; it prevents a defendant's rights from being extinguished before it receives adequate notice or before it comes under the personal jurisdiction of a court. Adopting the service rule is consistent with the statute, its legislative purpose, and the demands of the Constitution.

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[22] *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) (affirming appeals court decision to vacate district court judgment as defendant was ". . . not named as a party, was never served and did not formally appear at the trial."); *Estin v. Estin*, 334 U.S. 541, 548 (1948) (Nevada court with no personal jurisdiction over respondent has no power to alter respondent's rights under New York law).

CONCLUSION

The judgment of the Court of Appeals should be reversed with instruction to reinstate the order of the district court.

Respectfully submitted,

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APPENDIX

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CORPORATE MEMBERS/PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M
Allegiance Healthcare Corporation
Aluminium Company of America
American Automobile Manufacturers Assn.
American Home Products Corporation
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies, Inc.
Appleton Papers, Inc.
Atlantic Richfield Company
BASF Corporation
Baxter International, Inc.
Bayer Corporation
Becton-Dickinson & Company
Beech Aircraft Corporation
BIC Corporation
Black & Decker (U.S.) Inc.
BMW of North America, Inc.
Boeing Company, The
Bombardier Inc., Recreational Products
Bridgestone/Firestone, Inc.
Briggs & Stratton
Brown-Forman Corporation
Budd Company, The
C.R. Bard, Inc.
Caterpillar, Inc.
Celanese Ltd.
Chrysler Corporation
CLARK Material Handling Company
Coleman Company, Inc., The
Continental General Tire, Inc.
Coors Brewing Company
Corning Incorporated
Dana Corporation
Deere & Company
Digital Equipment Corporation
Dow Chemical Company, The
E. & J. Gallo Winery
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Estee Lauder Companies
Exxon Corporation, U.S.A.
FMC Corporation
Ford Motor Company
Fortune Brands, Inc.
Freightliner Corporation
Gates Corporation, The; Stant Corporation
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
Glaxo Wellcome Inc.
Goodyear Tire & Rubber Company, The
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Harnischfeger Industries Inc.

Heil Company, The
Hoechst Marion Roussel, Inc.
Honda North America, Inc.
Hyundai Motor America
International Paper Company
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joseph E. Seagram & Sons, Inc.
Kawasaki Motors Corp., U.S.A.
Kolcraft Enterprises, Inc.
Kraft Foods, Inc.
Loewen Group International, Inc.
Lorillard Tobacco Company
Lucas Varity
Lucent Technologies Inc.
Mack Trucks, Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Melroe Company
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motors R. & D. of America, Inc.
Motor Coach Industries International, Inc.
Motorola, Inc.
Navistar International Transportation Corp.
Nissan North America, Inc.
O. F. Mossberg & Sons, Inc.
Otis Elevator Co.
PACCAR Inc.
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Philip Morris Companies, Inc.
Porsche Cars North America, Inc.
Procter & Gamble Co., The
Raymond Corporation, The
Rheem Manufacturing
RJ Reynolds Tobacco Company
Rover Group, Ltd.
Schindler Elevator Corp.
Sears, Roebuck and Company
Shell Oil Company
Siemens Energy & Automation, Inc.
Smith & Nephew North America
SmithKline Beecham Corporation
Snap-on Incorporated
Sofamor Danck Group, Inc.
Solutia, Inc.
Sturm, Ruger & Co., Inc.
Subaru of America
Taylor Wharton Gas Equipment, A Division of Terex Corporation
Textron Inc.
Thomas Built Buses, Inc.
Toro Company, The
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.